Litigation Section of The State Bar of Califonia

Litigation Update

Litigation Section News

May 2006

Prescriptive easement arises unless sign posted by owner. *Civ. Code* §1008 provides that a prescriptive easement does not arise if the owner of the property posts "permission to pass" signs at designated places. (Check the statute for the very specific requirements.) But the signs must be *posted by the owner of the property*. In *Aaron v. Dunham* (Cal. App. First Dist., Div. 1; March 15, 2006) 137 Cal.App.4th 1244, [41 Cal.Rptr.3d 32, 2006 WL 636790] the signs had been posted by a lessee. This did not prevent a neighbor from obtaining a prescriptive easement across the property.

Batter assumes the risk of being hit by a beanball. Under the doctrine of primary assumption of risk as applied to a sporting event, *Knight v. Jewett* (1992) 3 Cal.4th 296, [11 Cal.Rptr.2d 2], held that a defendant is not liable for injuries inflicted during a sporting event if the risk of the injury is "inherent in the sport."

In *Avila v. Citrus Community College* (Cal.Supr.Ct.; April 6, 2006) [2006 DJDAR 4122], our Supreme Court applied the doctrine when a pitcher allegedly hit the batter *intentionally* and the batter sued the college on a number of negligence theories. The court concluded that "being intentionally hit is … an inherent risk of the sport, so accepted by custom that a pitch intentionally thrown at a batter has its own terminology: 'brushback,' 'beanball,' [and] 'chin music.'" Justice Kennard disagreed. Citing the *Official Rules of Major League Baseball*, rule 8.02(d) as authority for the proposition that throwing a beanball "should be—and is—condemned by everybody."

And in *Rostai v. Neste Enterprises* (Cal. App. Fourth Dist., Div. 2; April 5, 2006) 138 Cal.App.4th 326, [2006 DJDAR 4075], where plaintiff suffered a heart attack when his personal trainer was too aggressive in his training, the doctrine of primary assumption of risk was also applied to shield the trainer from liability.

Attorney lien may be protected even if not expressly covered in retention contract. Even though a retainer agreement did not provide for an attorney lien except in an unrelated matter, the lawyer was nevertheless entitled to an *equitable* lien on settlement proceeds for work done on the unrelated case. *County of Los Angeles v. Construction Laborers, et al.* (Cal. App. Second Dist., Div. 8; March 6, 2006) 137 Cal.App.4th 410, [39 Cal.Rptr.3d 917, 2006 DJDAR 2749].

Summary judgment statute trumps local general order. The San Francisco Superior Court has a standing order expediting summary judgment motions in asbestos injury cases. The order shortens time to 60 days (*Code Civ. Proc.* §437c, requires 75-day notice) and limits the evidence required to support the motion to an attorney declaration. The San Francisco Superior Court can't do this according to *Boyle v. Certainteed Corporation* (Cal. App. First Dist., Div. 4; March 10, 2006) 137 Cal.App.4th 645, [40 Cal.Rptr.3d 501, 2006 DJDAR 2971]. Local courts may not adopt rules or standing orders that conflict with statutes and California Rules of Court.

Court reaffirms rule prohibiting splitting a cause of action. When property owner was sued for personal injuries, its insurer initially refused to defend it in the action. Property owner filed a cross-complaint against insurer. Eventually insurer agreed to defend, reimbursed property owner for its costs of defense, and settled the personal injury action. The court then granted the insurer's motion for summary judgment which was affirmed on appeal. Property owner had meanwhile sued the insurer for breach of the covenant of good faith and fair dealing based on insurer's initial

Litigation Section Events

A Week in Legal London
July 9-14, 2006

A Week in Legal London is an extraordinary opportunity to experience the inner workings of the English legal system, expand litigation skills and engage in thought provoking discussions with leading distinguished members of the London legal community. Attend sessions at the Royal Courts of Justice, the Old Bailey, Magistrates and Crown Courts. Meet and dine with leading judges, barristers and solicitors. Visit the four Inns of Court and historic sites in London.

Oxford University Summer Program
Magdalen College, Oxford University

July 16-20, 2006

In conjunction with A Week in Legal London, the Litigation Section's Oxford University Summer Program is an "inside the walls" experience at Magdalen College, Oxford University. This program is a combination of both law and history, fascinating to all participants, attorneys and non-attorneys alike. You can choose to attend either the London or Oxford program or both. By attending both programs you will satisfy all you MCLE requirements including the mandatory subjects.

For a more complete description of each program see our web site, or call the Litigation Section at (415) 538-2546.

Click here: State Bar of California Week in the UK

refusal to defend. The court of appeal held that the claims in the cross-complaint and in the new action involved the same primary right. Therefore, the doctrine of res judicata barred the second action. *Lincoln Property Company, N.C., Inc. v. The Travelers Indemnity Company* (Cal. App. First Dist., Div. 3; March 20, 2006) 137 Cal.App.4th 905, [41 Cal.Rptr.3d 39, 2006 DJDAR 3275].

Privette doctrine extends to independent sub-contractors. Starting with *Privette v. Superior Court* (1993) 5 Cal.4th 689, [21 Cal.Rptr.2d 72], our Supreme Court has held that, with exceptions, the employee of an independent contractor may not sue the hirer of the contractor. In *Michael v. Denbeste Transportation, Inc.* (Cal. App. Second Dist., Div. 1; March 23, 2006) 137 Cal.App.4th 1082, [40 Cal.Rptr.3d 777, 2006 DJDAR 3483], the Court of Appeal applied the same limitation where the injured person was a subcontractor rather than an employee of the independent contractor.

Supreme Court will re-examine auditor's liability. In *Bily v. Arthur Young & Co.* (1992) 3 Cal.4th 370, [11 Cal.Rptr.2d 51], our Supreme Court limited the liability of auditors and accountants to third parties. On March 22, 2006, the Supreme Court granted review in *Frame v. PriceWaterhouseCoopers*, (Case No. S139410), which raises similar issues.

Ross Essay contest. Each year the ABA conducts an essay contest. This year the topic is "Your life in the law." As a lawyer, you have an important impact on the lives and fortunes of your clients. But the law affects lawyers, too. Tell the ABA about how practicing law has changed you as a person—for better or worse." The winner receives a $5,000 prize. For further information, go to http:www.abanet.org/journal/ereport/rossrules.html.

Minute order does not qualify as "notice of entry" to trigger time for appeal. *Cal. Rules of Court, Rule* 2(a)(1), requires a notice of appeal to be filed within 60 days "after the superior court clerk mails the party filing the notice of appeal a document entitled 'Notice of Entry' of Judgment or a file stamped copy of the Judgment, showing the date either was mailed."

In *Sunset Millennium Associates, LLC v. Le Songe, LLC* (Cal. App. Second Dist., Div. 5; April 5, 2006) 138 Cal.App.4th 256, [2006 DJDAR 4031], the clerk had sent appellant a 14-page minute order granting defendant's special motion to strike under the anti-SLAPP statute (*Code Civ. Proc.* §425.16). On page 13 were the words "notice of entry." This did not trigger the time to file the notice of appeal. The rule is interpreted literally and it requires that the document carry the title "notice of entry."

The Litigation Section of the California State bar is evaluating whether and how the *California Code of Civil Procedure* and *California Rules of Court* should be amended to deal with discovery of electronic information. The Section needs your help and asks that you take a few moments to participate in a member survey that seeks your experience and opinions about what is working and what is not working in this area. Your participation is anonymous unless you choose to share your contact information. The survey will take approximately 10 minutes.

To participate, click here or paste this web address into your web-browser: http://www.surveyconsole.com/console/takesurvey?id=195323

Your participation is important and greatly appreciated.